

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, DC 20350-1000

SECNAVINST 12700.2
OGC
18 June 1986

SECNAV INSTRUCTION 12700.2

From: Secretary of the Navy
To: All Ships and Stations

Subj: COOPERATION WITH THE OFFICE OF
SPECIAL COUNSEL OF THE MERIT
SYSTEMS PROTECTION BOARD

Ref: (a) DOD Instruction 5500.19 of 6 Dec 1985
(NOTAL)
(b) Public Law 95-454, "Civil Service Reform
Act of 1978," Title 5, U.S.C., §§1201,
1205, 1206, 1207, 2301 and 2302
(c) The Privacy Act, 5 U.S.C. §552a
(d) Civil Service Rule V, Section 5.4
(5 C.F.R. §5.4)
(e) The Hatch Act, 5 U.S.C. Chapter 73, sub-
chapter III
(f) Freedom of Information Act, 5 U.S.C.
§552

Encl: (1) Investigative Authority of the Special
Counsel
(2) Procedures
(3) Legal Representation

1. Purpose. To implement reference (a) and supplement references (b) through (f) by prescribing procedures and assigning responsibilities for cooperation with the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB).

2. Scope. The provisions of this instruction are applicable throughout the Department of the Navy (DON).

3. Policy. The DON will comply with the merit system principles, cooperate fully with the OSC's investigations of prohibited personnel practices, and conduct internal investigations of alleged illegal or improper conduct referred to DON by the OSC.

4. Background. The Civil Service Reform Act of 1978 (reference (b)) established the OSC under the MSPB. The investigative authority of the Special Counsel is set out in enclosure (1).

5. Responsibilities

a. The Secretary of the Navy (SECNAV) shall advise the Special Counsel of any action taken on referrals under Title 5, U.S.C. §§1206(b)(3) and (4) and 1206(c)(3).

b. The General Counsel of the Navy shall:

(1) Act on behalf of the SECNAV in responding to the Special Counsel except in regard to referrals under Title 5, U.S.C. §§1206(b)(3) and (4) and 1206(c)(3).

(2) Ensure compliance with reference (b) by obtaining a suitable investigation of any allegations referred to DON for investigation, including compliance with time limits for reporting the results of the investigation. The procedures for obtaining a suitable investigation are set out in enclosure (2).

(3) Ensure that DON legal counsel is assigned upon request to represent a DON employee suspected or accused by the OSC of committing a prohibited personnel practice or an illegal or improper act when the act complained of was within the scope of the employee's official responsibilities and such representation is in the interest of DON; or in unusual situations where the same conditions are satisfied but the use of DON counsel is inappropriate, that outside legal counsel is engaged. (See enclosure (3), Legal Representation.)

(4) Coordinate with the Judge Advocate General or the Director, Marine Corps Judge Advocate Division, as appropriate, the assignment or use of Navy or Marine Corps Judge Advocates as employee representatives.

(5) Forward to the Department of Defense and Navy IG copies of each allegation of improper or illegal conduct referred to the DON by the OSC and copies of final reports.

(6) Intervene when necessary for the purpose of representing the interests of DON in an MSPB hearing resulting from charges of misconduct against an employee of DON under the authority of the Civil Service Reform Act of 1978 (reference (b)).

(7) Make DON recommendations to the Department of Justice in regard to requests by employees for legal representation in obtaining judicial review of an order by the MSPB under Title 5, U.S.C. §1207.

c. The Assistant General Counsel (Civilian Personnel) shall:

(1) Serve as the Senior Management Official.

(2) Review for adequacy and legal sufficiency each report of an investigation.

(3) Serve as DON point of contact in providing assistance to the OSC in conducting investigations of alleged prohibited activities prior to the designation of a liaison officer for the component or counsel for an individual respondent for matters in litigation.

(4) Notify activities when an allegation of a prohibited personnel practice, violation of law, rule, or regulation, mismanagement, gross waste of funds, abuse

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of authority, or a substantial and specific danger to the public has been brought to the attention of the SECNAV or the General Counsel.

(5) Ensure that activity personnel are fully apprised of the nature and basis for an OSC investigation, as well as the rights and duties of activity personnel in such investigations.

(6) Monitor those investigations.

(7) Exercise the authority prescribed by reference (a) to ensure that any corrective or disciplinary action considered appropriate because of facts disclosed by an investigation is accomplished in a timely manner.

(8) Notify the OSC if an investigation replicates in whole or in part an existing or completed investigation so that redundant investigative efforts can be avoided.

(9) Advise the commanding officer or head of activity to appoint a liaison officer to serve as a point-of-contact for any OSC investigator who may initiate an investigation of an employee at a facility, base, or installation.

(10) Coordinate with the Judge Advocate General or the Director, Marine Corps Judge Advocate Division, as appropriate, so that a Judge Advocate may be appointed as the liaison officer whenever the OSC is investigating allegations of improper or illegal conduct by a military member.

d. The Liaison Officer shall:

(1) Coordinate with the cognizant office of the General Counsel or the Judge Advocate General providing legal services to the activity.

(2) Assist the OSC investigator.

(3) Ensure that all OSC requests for documents are in writing.

(4) Process all requests for documents and furnish to the OSC investigators copies of releasable documents requested under references (b), (c), and (d).

(5) Make witnesses available, ensure that the witnesses are advised of their right to legal assistance during the interview, and make appropriate arrangements for legal assistance if such assistance is requested by witnesses.

(6) Notify the Senior Management Official whenever the OSC initiates any investigation or requests information directly from a Naval activity.

(7) Notify the Senior Management Official if any investigation replicates in whole or in part an existing or completed investigation.

(8) Notify the Senior Management Official of any corrective action taken pursuant to recommendations by the OSC.

6. Reports. The reports required by this instruction are exempt from reports control by OPNAVINST 5214.7.

JAMES F. GOODRICH
Acting Secretary of the Navy

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INVESTIGATIVE AUTHORITY OF THE SPECIAL COUNSEL

1. The Special Counsel is authorized to investigate allegations of prohibited personnel practices.

2. The Special Counsel may investigate allegations concerning:

a. Political activity by Federal employees prohibited by the Hatch Act (reference (e)).

b. Arbitrary or capricious withholding of information prohibited by the Freedom of Information Act except intelligence information (reference (f)).

c. Activities prohibited by any civil service law, rule or regulation, including partisan political intrusion in personnel decision making, except when the Special Counsel determines that the allegations may be resolved more appropriately under an administrative appeals procedure.

d. Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action, except when the Special Counsel determines that such allegations may be resolved more appropriately under an administrative appeals procedure.

3. In the absence of any allegation, the Special Counsel is authorized to conduct an investigation to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

4. The Special Counsel may transmit an allegation of a prohibited personnel practice to an agency head for investigation and report if the Special Counsel determines that there is reasonable cause to believe that:

a. A violation of any rule or regulation has occurred.

b. Mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to the public health or safety has occurred.

If the allegations are referred to a command or activity for investigation, the procedures set out in enclosure (2) must be followed.

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5. The Special Counsel may refer whistleblowing disclosures to the concerned agency and require the agency to inform the Special Counsel of what action has been or is to be taken. In such instances, the procedures set out in enclosure (2) must be followed.

6. If after investigation, the Special Counsel determines that there is reasonable cause to believe that any violation of law, rule or regulation has occurred which is not a prohibited personnel practice or a criminal violation, the Special Counsel must report the violation to the agency. The Special Counsel may require the head of the agency to personally review the report and certify what action has been, or is to be taken. The procedures set out at paragraphs 2.e., 2.g., and 2.h. of enclosure (2) must be followed.

7. The Special Counsel may, after conducting an investigation and determining that there are reasonable grounds to believe that a prohibited personnel practice has occurred, make recommendations to the agency as to what corrective action should be taken.

8. The Special Counsel may approve, during an investigation, an agency's request to take disciplinary action against an employee for any alleged prohibited activity under investigation or for any related activity.

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PROCEDURES

1. When an activity has been notified by the Senior Management Official that an allegation of a prohibited personnel practice, violation of law, rule, or regulation, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public has been brought to the attention of the Secretary of the Navy or the General Counsel, the activity will respond by:

- a. Conducting a thorough investigation of all allegations.
 - b. Preparing an in-depth report within 30 days from receipt of notice.
2. The report must be submitted to the Senior Management Official and should:
- a. Identify the individual(s) who investigated the charges.
 - b. Disclose whether or not witnesses were offered confidentiality for their responses.
 - c. List witnesses interviewed, including the complainant (if known) and the targets of the probe; attach copies of the statements made by the witnesses.
 - d. Disclose the method and scope of the on-site investigation, and state whether advance notice of the on-site inspection was given.
 - e. Summarize relevant and material evidence considered in reaching the conclusions on each allegation.
 - f. Attach copies of relevant portions of any local instruction used in the investigation.
 - g. State whether the investigation revealed any violation or apparent violation of any law, rule, or regulation.
 - h. Describe any corrective action taken or planned, i.e., changes in agency rules, regulations or practices, the restoration of any aggrieved employee, disciplinary action against any employee or referral to the Attorney General of any evidence of a criminal violation.

3. The activity conducting the investigation is responsible to notify the chain of command as appropriate by providing copies of reports and correspondence.

Enclosure (2)

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LEGAL REPRESENTATION

1. An employee or member of the Department of the Navy (DON) asked to provide information (testimonial or documentary) to the OSC in the course of an investigation by that office may obtain legal advice from DON attorneys, both civilian and military, regarding that employee's or member's rights and obligations. This includes assistance at any interviews with OSC investigators. However, the attorney-client relationship shall not be established unless the employee is suspected or accused by the OSC of committing a prohibited personnel practice and has been assigned DON counsel.
2. An employee who believes he or she is suspected or has been accused by the OSC of committing a prohibited personnel practice may request legal representation from the DON, except as provided in paragraph 7. Whenever an attorney from the DON is likely to face an ethical conflict between obligations to the employee client and to the DON, and in any case where the suspected or accused employee has requested representation from another DOD Component, the attorney assigned shall be a military member or employee from another DoD Component. Outside legal counsel may be retained by the DON on behalf of the employee only under unusual circumstances and only with the personal approval of the General Counsel of the Navy.
3. The General Counsel of the Navy shall determine whether a likely conflict will occur if an attorney from the DON is assigned to represent the employee and request assistance in obtaining representation from outside the DON.
4. To obtain legal representation the employee must:
 - a. Request legal representation, in writing, together with all process and pleadings served, and explain the circumstances that justify legal assistance.
 - b. Indicate whether he or she has retained legal counsel from outside the DON.
 - c. Obtain from his or her supervisor a certification in writing that the employee was acting within the scope of his or her official duties, and that no adverse or disciplinary personnel action against the employee for the conduct being investigated by the OSC has been initiated by activity management.
 - d. Forward such requests to the General Counsel of the Navy via the designated liaison officer.

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5. Legal representation may not be provided until and unless the General Counsel of the Navy approves an employee's request.
6. The conditions of legal representation must be explained to the accused employee in writing and accepted in writing by that employee.
7. DON resources may not be used to provide legal representation for a civilian employee with respect to a DON disciplinary action against the employee for committing or participating in a prohibited personnel practice or for engaging in illegal or improper conduct, regardless of whether that participation or conduct is also the basis for the disciplinary action proposed by the OSC.
8. After approval under paragraph 4 of an employee's request, a DON attorney shall be assigned (or, in unusual circumstances, outside counsel retained) as the employee's representative in matters pending before the OSC or MSPB. This approval may be limited to representing the employee only with respect to some of the pending matters if other specific matters of concern to the OSC or MSPB do not satisfy the requirements of this enclosure.
9. An attorney-client relationship will be established and continued between the suspected or accused employee and assigned DON counsel.
10. In representing a DON employee under this Instruction, a DON attorney designated counsel for the employee shall act as a vigorous advocate of the employee's individual legal interests before the OSC or MSPB, and the attorney's professional responsibility to the DON and his or her employing activity will be satisfied by fulfilling this responsibility to the employee. The assigned counsel will be allowed adequate official time to properly represent his/her client. Legal representation may be terminated only with the approval of the General Counsel, and normally only on the basis of information not available at the time the attorney was assigned.
11. The attorney-client relationship may be terminated if the assigned DON counsel for the civilian employee determines, with the approval of the General Counsel:
 - a. That the employee was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge of a prohibited personnel practice.
 - b. That termination of the professional representation is not in violation of the rules of professional conduct applicable to the assigned counsel.

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12. The DON attorney designated as counsel may request relief from the duties of representation or counseling without being required to furnish explanatory information that might compromise the assurance to the client of confidentiality.

13. This Instruction authorizes cognizant DON officials to approve requests for travel, per diem, witness appearances, or other support necessary to ensure effective legal representation of the employee.

14. An employee's participation in OSC investigations, MSPB hearings, and other related proceedings will be considered official DON business for time and attendance requirements and for other similar purposes.

15. The following advice to employees questioned during the course of an OSC investigation may be appropriate in response to the most frequent inquiries.

a. An employee may decline to provide a "yes" or "no" answer in favor of a more qualified answer when this is necessary to ensure accuracy in responding to an OSC interviewer's questions.

b. Requests for clarification of both questions and answers are appropriate to avoid misinterpretation.

c. Means to ensure verification of an interview by OSC investigators are appropriate, whether the employee is or is not accompanied by a legal representative. Tape recorders may only be used for this purpose when: (1) the recorder is used in full view; (2) all attendees are informed; and (3) the OSC interrogator agrees to the tape recording of the proceeding.

d. Any errors that appear in a written summary of an interview prepared by the interviewer should be corrected before the employee signs the statement. The employee is not required to sign any written summary that is not completely accurate. An employee may make a copy of the summary for his or her own use as a condition of signing.